FILED
NOV 6 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 19

LARRY GARA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

LARRY GARA,
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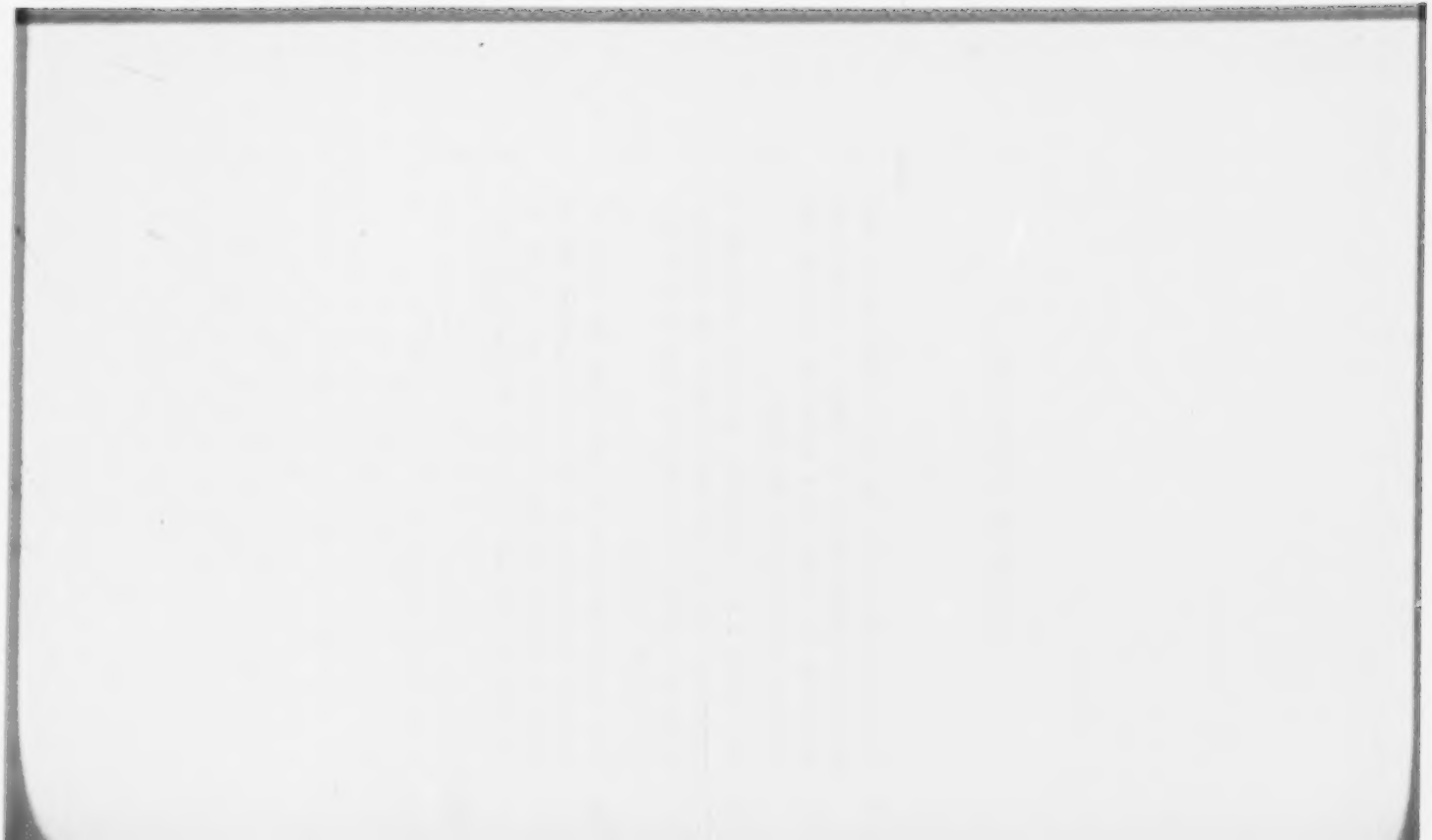

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To the Justice of the Supreme Court of the United States:

The petitioner respectfully asks the court to withdraw its decision rendered on the 23rd day of October, 1950, and to grant a rehearing because of errors of law and facts contained therein.

The decision now asked to be withdrawn is as follows:

> "PER CURIAM: The judgment is affirmed by an equally divided court. Mr. Justice Clark took no part in the consideration or decision of this case."

I. The Court Having by the Above Decision in Fact Upheld the Judgment of the Court of Appeals of November 28, 1949, Thus Failed to Consider the Questions Presented by This Case.

It is respectfully urged that the Court has misconceived and failed to consider the questions presented by this case.

Petitioner contended in his brief in this case that "In advising and instructing the jury, the Trial Court in effect held that the petitioner could and must be convicted for telling one of his students to follow his conscience." (Page 7 of Brief of Petitioner.) The government in its brief contra-contended that "On the record in this case, it was within the jury's province to find that petitioner told Rickert "not to register", and did not merely offer comfort or moral support to Rickert in the position he had been led by his conscience to take." (Page 16 of Brief for the United States.)

The Court of Appeals stated in its opinion (Record Page 207):

> "The case argued by appellant in many ways is based upon a different set of facts from those presented here. We do not have a mere attempt on appellant's part to comfort or give moral support to someone who is paying the penalty for his refusal to register."

Some of the members of this Court were apparently under the impression that the jury found that Gara "told Rickert not to register", instead of finding that Gara told Rickert to follow his conscience, or gave Rickert mere comfort or moral support. Mr. Justice Minton asked during oral argument: "Isn't it true that Gara told Rickert not to register? Wasn't that the issue submitted to the jury?", or words to that effect.

We submit that under well-recognized principles of law this Court must decide this case on the assumption that all the jury found as a fact was that Gara told Rickert to follow his conscience, or that Gara gave comfort or moral support to Rickert in the position Rickert had been led by his conscience to take. This case must be so considered for the *fundamental reasons* that:

(1) Gara was not allowed, by the Trial Court, to

introduce evidence tending to show that he did no more than tell Rickert to follow his conscience, or that he merely gave Rickert comfort or moral support in the position Rickert had been led by his conscience to take. The Trial Court, in excluding this evidence, ruled that this was immaterial and would not lessen the offense.

(2) The jury was told by the Trial Court, in effect, that Gara must be convicted even though he merely told Rickert to follow his conscience or simply gave Rickert comfort or moral support in the position Rickert had been led by his conscience to take.

After the government had introduced letters, a pledge, and an unsigned statement referring to a speech Gara had made, for the purpose of showing Gara's frame of mind, or his intent in doing the act he was charged with doing[1], Gara made repeated attempts to introduce evidence to the jury which would tend to rebut this evidence, and would tend to show that Gara would only comfort or support those who were "inwardly prepared" for a non-registrant stand.

Beginning on page 66 of the record, Mr. Heisler was attempting to introduce in evidence, over objection by the government, part of a properly-identified pamphlet which the government had introduced as a mutilated exhibit, only part of it being allowed to go to the jury. At this point, the following appears in the record:

"The Court: What is the purpose of this?

Mr. Heisler: That there was a conversation between this man and the defendant concerning the basic philosophy and underlying conduct of the defendant; to show that notwithstanding this witness' recollec-

1. The jury was instructed to "consider this evidence as having been admitted only for the purpose of enabling the jury to obtain some index into the mind of the defendant on the question of his intent when it is charged that he *knowingly* counseled, aided and abetted another person to refuse or evade registration". (Record Page 167.)

tion about being inwardly prepared, it could not have been otherwise; that if Mr. Gara subscribed to the contents of this pamphlet, obviously he would not have gone out and preached on the highways and byways, but *was going to pick those people to talk to who were inwardly prepared.*

The Court: Does that lessen the offense?

* * * * *

The Court: I will sustain the objection."

Again on page 85 of the record, Gara attempted to introduce testimony of Robert Amstutz to the effect that Gara had told Amstutz to complete registration because Amstutz was not inwardly prepared for a non-registrant stand. The Court sustained an objection to this testimony, and the testimony is in the record only by way of offer of proof. It was never presented to the jury.

It is true that this testimony concerned acts other than the one with which Gara was charged, but so did the letters, pledge, and part of the unsigned statement presented as evidence by the government. If the Trial Court had felt that this evidence of intent was material, it should have admitted it to rebut the different evidence of intent presented by the letters, pledge and unsigned statement introduced and admitted in evidence for the government. The only reason the Court had for keeping this evidence out was that the fact that Gara would support only those who were "inwardly prepared" did not "lessen the offense", in the view of the Trial Court.

Similar rulings are sprinkled liberally throughout the entire record. The jury was not allowed to hear or weigh evidence tending to show that Gara would support only those who were inwardly prepared, and it was repeatedly impressed with the fact that the Trial Court considered that such evidence concerned facts which, if true would not "lessen the offense."

II. The Court Has Completely Ignored Petitioner's Contention That He Has Been Denied the Constitutional Protection of Freedom of Speech and Free Exercise of Religion.

In instructing the jury at the conclusion of the trial, the Trial Court stated (Record page 167):

> "The real question is whether the words used were knowingly used in such circumstances and were of such a nature as that they would have a *tendency* to cause a refusal of duty as required by the Act."

In defining the terms "aiding" and "abetting", as used in the statute and the indictment, the Court told the jury that: "To aid is to support." (Record page 168.)

Then to make sure that the jury understood that it must convict Gara taking all the facts most favorable to him, the Court said (Record page 169):

> *"It is the apparent contention of the defendant that he did not counsel,* aid or abet Rickert in his refusal to register on September 10, 1948, *but merely that he supported him in his attitude after he, Rickert, had decided in his own mind not to register because of his religious beliefs or the dictates of his own conscience. You are instructed that if what the defendant knowingly said to Rickert on the 8th day of November, 1948, under the circumstances then and there present, was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register under the Selective Service Act of 1948, whether or not it actually had that effect, it would constitute an offense within the meaning of this Act, as charged in the second count of the Indictment."* (Record page 169.)

Taking the foregoing instruction as a whole and juxtaposing the contention of petitioner that he "merely supported" Rickert with the direct reference to the accom-

plishment of the offense, it becomes immediately clear that the jury had to conclude that their duty was to convict petitioner even though he did nothing more than subsequently support Rickert in his decision of non-registration.

In the face of these instructions to the jury, how can the government in fact or in law contend that "it was within the jury's province to find that petitioner told Rickert 'not to register', and did not merely offer comfort or moral support to Rickert in the position he had been led by his conscience to take." The jury was *directed* to find Gara guilty if no more than mere support was proven, and this case must be decided on that basis.

III. This Court's Decision by Upholding the Court of Appeals Singles Out the Selective Service Act as Directed Against the Free Exercise of Religion as a Continuing Offense Which Runs Forever and Ever.

The Petitioner contended before the Trial Court and before the Court of Appeals that he could not be guilty of the offense charged against him, namely, counselling Rickert; who refused to register; who was indicted; who pleaded guilty and who was sentenced for his refusal to register on September 10, while petitioner did not even meet Rickert until after the 20th of September. The Court of Appeals in its opinion says (pages 203 and 204 of the transcript):

> "Since Rickert, at the time of his arrest, did not in words decline to register on November 8, it is contended that his offense was complete on September 10, 1948, Appellant further urges that his advice on November 8 that Rickert should not permit himself to be coerced into changing his mind could not affect Rickert's action nor constitute a violation of the statute; that the indictment does not properly charge the offense and that the evidence does not sustain the conviction.

> "These contentions are untenable. Rickert's failure to perform his obligation to register constituted a completed offense on September 10, but it was repeated on every day thereafter during the period involved herein, for he was under a continued duty to register."

We do not know what the Court of Appeals means "that the offense was repeated during the period involved herein", but we know that our contention set forth in our brief is based on the opinion of the Court of Appeals that if the offense of non-registration is a continuing one, then a non-registrant may be sent to the penitentiary for five years for each day of "the period involved herein."

The opinion of the Court of Appeals also shows that the Government's argument is not well taken when it is stated that:

> "There is no merit in the argument that the regulation makes each day of refusal a separate crime." (Page 15 of the Government's brief.)

As a matter of fact and law, albeit a bad one, on the basis of the Court of Appeals opinion, it may be considered that the regulation makes not each day of refusal, but each hour and even each minute of refusal a separate crime.

We do not believe that the decision by this Court intended to establish the above as the law of this land, but it does by upholding the judgment of the Court of Appeals.

The Court of Appeals says:

> "The fact that appellant sincerely believed that it was his Christian duty to oppose registration does not absolve him from the violation of the Statute. The rights of religion are not beyond limitation." (Citing cases.)

We respectfully submit, as we did during our oral argument when questioned by Mr. Justice Reed, that it is up to this Court to decide whether or not the constitutional provisions guaranteeing the free exercise of religion stand or it must fail by upholding the judgment of the Court of Appeals. We respectfully submit that the Selective Service Act of 1948, as it was applied by the Court of Appeals to this petitioner, leaves only two choices, namely to declare that the Act is unconstitutional, or that the Constitution does not mean what it says as to free exercise of religion.

The Court of Appeals also adjudged that:

> "The District Court did not err in charging that it was immaterial whether appellant succeeded in dissuading Rickert from registering. It is immaterial * * * whether appellant did or did not make a practice, as he contends, of counselling only those who were 'inwardly fixed' in their conscience to refuse to register."

This holding by the Court of Appeals is wholly at variance with the decision of this Court in *United States* v. *Ballard*, 322 U. S. 78.

The judgment of the Court of Appeals now upheld by this Court says:

> "Also the District Court properly charged that it was not necessary to prove that appellant actually brought about Rickert's violation of the statute if his words were used in such circumstances and were of such a nature that they would have a tendency to cause Rickert to refuse to register."

Such a holding is wholly contrary to the decision of this Court in the case of *Terminiello* v. *Chicago*, 69 S. Ct. 894. The Court of Appeals opinion which is upheld by this court further says:

> "Nor do we think that appellant's argument that the

> Selective Service Act violates his constitutional right of free speech on the ground that it restricts freedom of speech and that there is no clear and present danger (Cf—*Terminiello* v. *Chicago,* 337 U. S. 1) justifying such restriction, can be sustained. The cited case involved an ordinance which, as construed by the trial court, directly invaded freedom of speech. The Selective Service Act does not even purport to enter the field of restriction of speech or of publication."

It is hard, if not impossible, to follow the Court of Appeals since petitioner was convicted and his conviction was upheld because he said to Rickert, fifty-eight days after Rickert refused to register, "Good Luck, Charles. Don't let them coerce you to change your conscience." It is hard, if not impossible, to distinguish the holding of this Court in the *Terminiello* case, *supra,* as applied to Terminiello, and as it was applied by the Court of Appeals to petitioner.

That the freedom of speech constitutionally guaranteed was negated by the Court of Appeals in the case of petitioner is apparent because the opinion says (page 207 of the transcript):

> "Appellant may attack the Selective Service Act of 1948 from every platform in America with impunity, but he cannot, under the guise of free speech, nullify it by disobedience to its express provisions."

Conclusion.

This petitioner respectfully prays that the Court's decision cannot be justified upon the grounds set forth in the opinion of the Court of Appeals that was upheld by the decision of this Court. In order to reach the decision as the Court of Appeals did, it must be said that petitioner will stand as a felon just because he exercised his freedom of speech, said certain things that had "the tendency" to

actuate someone (Rickert) to act as he did fifty-eight days before petitioner said the incriminating words.

To hold with the Court of Appeals, it is necessary to say that a non-registrant acting in accordance with his conscience and in accordance with his free exercise of religion, is guilty of the offense "during the period involved herein," whatever that period may mean.

To hold with the Court of Appeals, it is necessary to say that the constitutionally guaranteed free exercise of religion does not exist as against the Selective Service Act of 1948.

To hold with the Court of Appeals, it is necessary to say that lack of intent to commit a crime will make the crime nevertheless accomplished. It will be necessary to overrule various cases heretofore standing unchallenged as they were set down by this Court.

The petitioner and others believe that they are entitled to learn from this Court the answer to the questions so raised by petitioner. The Quakers[1] and Brethren and the Mennonites and members of other peace churches,[2] are entitled to know whether or not they are all law violators when they support their fellow church members who, for the sake of conscience and religious belief, refuse to register.

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[1] On July 22, 1948, the Religious Society of Friends in the United States had urged their members numbering some 100,000 "to support young Friends and others who expressed their opposition to conscription either by non-registration, or by registration as conscientious objectors. We warmly approve civil disobedience under Divine compulsion * * *."

[2] These organizations also felt that this is a case in which petitioner was convicted for simply advocating following the promptings of conscience.

The brief of the American Friends Service Committee states at page 4:

> "We believe it is important for the Supreme Court of the United States to pass upon the issues of religious freedom involved in this case and to determine *whether or under what circumstances it can be made a criminal offense in the United*

Because of the far reaching importance of the decision of the Court of Appeals now upheld by the decision of this Court, petitioner respectfully requests that the decision of this Court of October 23, 1950, be withdrawn and that he be granted a rehearing in this case.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

FRANCIS HEISLER,
One of the Attorneys for Petitioner.

States to counsel others that it is right to obey God rather than man."

The brief of the Ohio Pastors Convention states at page 2:

"Great numbers of Christian ministers today are profoundly concerned about what appears to them, in this decision of the Court of Appeals, to be a deeply serious abridgment of that which they believe to be one of their most inalienable rights as Christian ministers, namely, *the right to counsel lay members of their churches and fellowships to adhere to the decisions of the individual conscience.*"